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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
GTE Corporation,	)	
Transferor,	)	
	)	
AND	)	
	)	
Bell Atlantic Corporation,	)	CC Docket No. 98-184
Transferee,	)	
	)	
For Consent to Transfer Control of Domestic	)	
and International Section 214 and 310	)	
Authorizations and Applications to Transfer	)	
Control of a Submarine Cable Landing License	)	

OPPOSITION OF AT&T CORP.

Pursuant to the Common Carrier Bureau's Public Notice (DA 01-1790, released August 1, 2001), AT&T Corp. submits the following opposition to Verizon's proposal to remove Pennsylvania from the federal Carrier-to-Carrier Performance Plan.[1]

The basis for Verizon's proposal is its claim that states have adopted comprehensive performance plans that obviate the need to continue the federal Carrier-to-Carrier Performance Plan that was, *inter alia*, designed to offset the anticompetitive effects of the Bell Atlantic/GTE merger. However, as AT&T has demonstrated in its comments in opposition to Verizon's section 271 application for Pennsylvania[2], the

[1] AT&T does not oppose Verizon's request with respect to Illinois and Ohio.

[2] *Application by Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138 ("*Pennsylvania 271 Proceeding*").

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current Performance Assurance Plan in that state is insufficient to provide Verizon with the necessary incentives to perform in a nondiscriminatory and commercially reasonable manner toward its competitors. Therefore, the state plan should not be viewed as an adequate substitute for the federal Carrier-to-Carrier Performance Plan unless and until the state plan is modified as AT&T has recommended in its comments in the *Pennsylvania 271 Proceeding*[3] and it covers all of Verizon's activities in the state.

First, AT&T, the DOJ and the Pennsylvania Office of Consumer Advocate noted that Verizon has not even agreed unequivocally to accept *any* remedy plan in Pennsylvania, because it has not abandoned its legal right to challenge the PaPUC's authority to impose monetary consequences on it for poor performance (*see* AT&T Reply at 39-40). Even more fundamentally, however, the remedies established by the state plan are paltry compared to the benefits of noncompliance, and Verizon has actively opposed recent efforts by the PaPUC to adopt a remedy structure modeled on that of New York. The PaPUC's ongoing efforts to modify the state plan are clear proof that the current plan and remedies are inadequate, as is the DOJ's critique of the existing plan (*see* AT&T Reply at 38-41).[4] Finally, it is AT&T's understanding that the current Pennsylvania performance plan applies only to "Verizon Pennsylvania", not to "Verizon North", the successor to GTE in Pennsylvania. Therefore, reliance on the existing state remedy structure is insufficient, as both a legal and practical matter, to deter Verizon from

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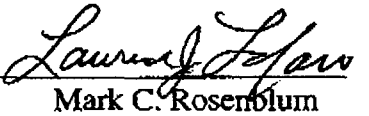
[3] *See* AT&T's Comments (at 8-9 & 56-66) and Reply (at 5 & 36-45) in the *Pennsylvania 271 Proceeding*, filed July 11, 2001 and August 6, 2001, respectively, which are incorporated herein by reference and appended as Attachments 1 and 2 hereto.

[4] Moreover, as pointed out by one of the Pa PUC Commissioners, Verizon's improper implementation of measures within the plan renders its performance data unreliable (*see* AT&T Comments at 8).

engaging in discriminatory and anticompetitive behavior toward its fledgling competitors in the local services market in Pennsylvania. Accordingly, the federal plan and remedies should remain in effect until these deficiencies in the Pennsylvania state plan are fully cured.

Respectfully submitted,

AT&T CORP.

By 
Mark C. Rosenblum
Lawrence J. Lafaro
Richard Rubin

Their Attorneys

Room 1142M1
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-8410

Dated: August 31, 2001

ATTACHMENT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon Pennsylvania	)	
Inc., Verizon Long Distance, Verizon	)	
Enterprise Solutions, Verizon Global	)	**CC Docket No. 01-138**
Networks Inc., and Verizon Select	)	
Services Inc., for Authorization To	)	
Provide In-Region, InterLATA	)	
Services in Pennsylvania	)	

COMMENTS OF AT&T CORP. IN OPPOSITION TO VERIZON PENNSYLVANIA'S SECTION 271 APPLICATION FOR PENNSYLVANIA

Mark C. Rosenblum
Richard Rubin
AT&T CORP.
295 Basking Ridge, NJ
(908) 221-4481

David W. Carpenter
Mark E. Haddad
Ronald S. Flagg
R. Merinda Wilson
David L. Lawson
Richard E. Young
Ronald Steiner
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for AT&T Corp.

July 11, 2001

Part IV explains that there is no sound basis for Verizon's assertion that it is subject to "a comprehensive, self-executing performance assurance mechanism that provides . . . incentives to provide the best wholesale performance possible." Verizon Br. at 84. In this case, Verizon has refused to make an unequivocal commitment to establish *any* remedy plan, much less an adequate plan. The Pennsylvania Performance Assurance Plan ("PaPAP") on which Verizon relies is wholly insufficient to deter anticompetitive conduct. The PaPAP omits key metrics that are important to any showing of nondiscriminatory conduct. Additionally, as pointed out by Commissioner Brownell,[7] Verizon's improper implementation of measures within the plan renders its performance data unreliable, and its performance results are otherwise unverifiable. Ensuring the completeness and reliability of performance measures and results before Section 271 entry is critical not only to measuring checklist compliance, but to establishing an appropriate point of departure against which to assess backsliding.

Even assuming, *arguendo,* that Verizon's performance measures and results could be deemed complete and reliable – and they most assuredly are not – the PaPAP still is incapable of deterring backsliding because the penalties it establishes are paltry compared to the benefits of noncompliance. Recognizing this, Verizon would appear to have this Commission believe that it will voluntarily adopt any new measurements that may be imported into the PaPAP from New York. Verizon's pattern of conduct to date, however, belies this suggestion. As a predicate matter, Verizon has taken the position that the PaPUC lacks authority to implement *any* performance standards and remedies. Even after the PaPUC conditioned approval of Verizon's 271 application on, *inter alia,* the withdrawal of Verizon's state court challenge to the existing PaPAP, Verizon only discontinued that appeal – effectively leaving it free to raise its

[7] Dissenting Statement of Comm'r Brownell at 2.

fundamental challenge to the state commission's authority to apply remedies for discriminatory wholesale performance in response to any further PaPUC action concerning the PAP.

Moreover, any suggestion that Verizon is willing to import the New York remedies plan into Pennsylvania is thoroughly contradicted by Verizon's actions. In prior state proceedings, Verizon has strongly opposed the adoption of the New York PAP in Pennsylvania. And in a pleading filed with the PaPUC just last week, Verizon made it clear that it continues to reject the New York plan as a model for use in Pennsylvania. Under these circumstances, there is no basis for finding that Verizon is currently subject to an enforcement plan with "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal." *New York 271 Order* ¶ 433.

Finally, Part V sets forth the reasons why approval of Verizon's application would not serve the public interest. Section 271 makes clear, and this Commission has acknowledged, that even where (unlike here) a BOC has fully implemented each of its checklist obligations, interLATA authorization is not in the public interest if other relevant factors demonstrate either that its local markets are not open to competition or that they will not remain open to competition. As the dissenting statements of two Pennsylvania Commissioners attest, it is premature to conclude even that the Pennsylvania local market is fully open to competition, let alone that it will assuredly remain so. Competitors serve only a tiny fraction of the residential lines in the former Bell Atlantic territory of Pennsylvania, and many of the competitors to which Verizon points either have not yet entered the market in any significant way, are exiting or reducing their presence in the market, or are in extreme financial distress. None has yet made investments in the Pennsylvania market and established a record of success sufficient to provide assurance that the vigorous local competition promised by the Act will ever occur, let alone

Verizon's claims that it has modified its systems (whether implemented or merely promised) cannot disguise what its own application effectively acknowledges: its electronic bills are inadequate, and numerous major issues concerning the accuracy of such bills remain unresolved. Fawzi/Kirchberger Decl. ¶ 81; *see also id.* ¶ 73. The Pricewaterhouse Coopers ("PwC") review that Verizon commissioned lends no support to its claim that its electronic bills are accurate. That review is no substitute for actual commercial data, which the Commission has described as the most probative evidence of a BOC's compliance with its OSS obligations. *Michigan 271 Order* ¶ 138. PwC simply did not evaluate the CLECs' experience. Instead, PwC simply reviewed Verizon's electronic bills to see if they matched Verizon's paper bills. PwC did not undertake any review of the accuracy of any bill, but merely assumed that the paper bills were accurate, despite CLEC claims attesting to the inaccuracy of Verizon's paper bill.[61] Verizon Br. at 66; McLean/Wierzbicki/Webster Decl. ¶ 143; Fawzi/Kirchberger Decl. ¶¶ 85-92.

Nor are the deficiencies in Verizon's electronic bills cured by Verizon's complex (and completely manual) workaround process. That process still does not give CLECs the ability to perform a reasonable verification of the charges on the bill – an capability that only an adequate electronic bill can provide. *Id.* ¶¶ 82-84. Until Verizon demonstrates that it is providing such bills, it cannot be found to have fully implemented the competitive checklist.

Finally, while promises of improved future performance carry no weight in a Section 271 proceeding, it is important to note that the PaPUC's conditions will not give Verizon an adequate incentive to cure its failure to provide adequate electronic bills. The PaPUC

[61] The recent PwC analysis of Verizon's electronic bills that Verizon attached to a July 3 *ex parte* submission to the Commission in this proceeding provides no more probative evidence that its electronic bills are accurate. *See* letter from Clint Odom (Verizon) to Magalie Roman Salas, dated July 3, 2001. Like its earlier review, the new PwC analysis simply compared Verizon's electronic bills to its paper bills without determining whether the paper bills were in fact accurate. Fawzi/Kirchberger Decl. ¶¶ 93-95.

expressly declined to address Verizon's misreporting of performance data under the erroneous methodology that Verizon unilaterally adopted. PaPUC Consultative Report at 258. Moreover, the modifications that the PaPUC required to the billing remedies in the PAP expire on December 31, 2001 – plainly too short a time to give Verizon any substantial incentive to provide necessary nondiscriminatory support to its competitors in this competitively very significant area by actually fixing the numerous billing problems in its systems. Fawzi/Kirchberger Decl. ¶¶ 96-102.

IV. VERIZON'S PERFORMANCE MEASURES AND THE PENNSYLVANIA PERFORMANCE ASSURANCE PLAN ARE INADEQUATE.

This Commission has held that "[w]here, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization," the BOC must demonstrate that its performance enforcement plan contains a comprehensive set of "clearly-articulated, pre-determined measures and standards" that can "detect . . . poor performance" and accurately capture actual performance, as well as self-executing enforcement mechanisms with sufficient monetary consequences that will serve as powerful deterrents to anticompetitive conduct. *New York 271 Order* ¶ 433. The Pennsylvania Performance Assurance Plan ("PaPAP") on which Verizon relies to support its application does not and cannot satisfy this basic test.

The PaPAP is fundamentally flawed both in its comprehensiveness and its ability to capture actual performance for several reasons. *First*, the PaPAP is incomplete because it omits key measures that are essential to any showing of nondiscriminatory performance. *Second*, Verizon's improper implementation of performance measures in the PaPAP renders its

performance results unreliable. Moreover, although Verizon asserts that the data replication test and "Commercial Availability Review" conducted by KPMG confirm the accuracy and reliability of its performance reports,[62] KPMG's tests were so limited in scope that they did not and could not validate the accuracy of Verizon's performance reports. *Third,* Verizon's performance results that serve as the basis for remedies calculations are unverifiable.

Not only are the performance measures and underlying performance data that serve as the springboard for remedies under the PaPAP incomplete, unreliable, and unverifiable, but the very structure of the PaPAP itself – including its illusory or paltry monetary remedies – renders it an ineffective tool to deter anticompetitive conduct after any Section 271 entry. Moreover, there can be no solace that Verizon will willingly adopt and properly implement any refined or new performance measures emanating from the New York collaborative proceedings as Verizon suggests,[63] or that it will embrace any New York PAP remedies that may be imported into the PaPAP in the future. Verizon's flagrant disregard of the Pennsylvania PUC's prior orders and its unilateral changes to established performance standards, coupled with its on-the-record opposition to the Pennsylvania PUC's imposition of *any* remedial enforcement mechanisms, demonstrate that it cannot be trusted to do the former or the latter. In fact, Verizon has steadfastly "oppose[d] the adoption of the New York PAP in Pennsylvania."[64] And, in all events, Verizon's promises and unfulfilled commitments cannot serve as a suitable surrogate for actual proof demonstrating that Verizon "is already in full compliance with the requirements of Section 271." *Michigan 271 Order* ¶ 55.

[62] Guerard/Canny/DeVito Decl. ¶¶143, 145.

[63] *See, e.g.*, Verizon Br. at 85 (noting that "all parties now agree that the remaining New York measurements should be adopted for use in Pennsylvania as well").

A. The PaPAP Does Not Measure Actual Performance.

1. The PaPAP Omits Key Measures.

The current version of the PaPAP does not and cannot possibly capture Verizon's actual performance in full because it excludes a number of measures that are necessary to detect discriminatory performance. Bloss/Nurse Decl. ¶¶ 15-22. As a result, Verizon will suffer no financial consequences under the PaPAP even for grossly discriminatory performance in those areas. Moreover, the exclusion of these metrics from the PaPAP violates the basic requirement that an enforcement plan must "encompass a comprehensive range of carrier-to-carrier performance." *New York 271 Order* ¶ 433.

The omitted metrics are neither trivial nor insignificant. One striking example is the failure of the PaPAP to include *any* measures on flow-through rates. Bloss/Nurse Decl. ¶ 25. This Commission has recognized that flow-through rates "are a tool used to indicate a wide range of possible deficiencies in a BOC's OSS that may deny an efficient competitor a meaningful opportunity to compete in the local market." *New York 271 Order* ¶ 162; *Massachusetts 271 Order* ¶ 77. Notably, when this Commission approved Verizon's Section 271 application to provide long distance services in New York, its performance assurance plan included remedies associated with two flow-through measurements: (1) the total flow-through rate (that measures the percentage of total orders received through the electronic ordering interface that are processed without manual intervention); and (2) the achieved flow-through rate (that measures the flow-through rates of orders that are designed to flow through). *See, e.g.*, Bloss/Nurse Decl. ¶¶ 25-26.

[64] Prehearing Memorandum of Verizon Pennsylvania, filed July 5, 2001, Re: Performance Measures Remedies, Docket No. M-00011468 (Pa. Pub. Util. Comm'n) ("Verizon Prehearing Memorandum") at 2.

In stark contrast, although the Pennsylvania Carrier-to-Carrier Guidelines ("Pa. C2C Guidelines") include a total flow-through measurement, that metric is reported by Verizon "for diagnostic purposes" only and is expressly *excluded* from the PaPAP.[65] Additionally, neither the Pa. C2C Guidelines nor the PaPAP contains *any* measurement covering Verizon's achieved total flow-through rate. Bloss/Nurse Decl. ¶¶ 25-26. Thus, under the current PaPAP, Verizon suffers no financial consequences for unacceptably high levels of manually-processed orders.

The significant omissions in the PaPAP are not confined to flow-through measurements. Notwithstanding the Commission's January 2001 *Line Sharing Reconsideration Order* directing Section 271 applicants to demonstrate that they provide line splitting in a nondiscriminatory manner, the PaPAP omits any metrics on line splitting. Bloss/Nurse Decl. ¶ 19. Similarly, despite this Commission's repeated admonitions regarding the importance of timely and accurate billing completion notices,[66] the Pa. C2C Guidelines, as well as the PaPAP, contain no measurements that assess Verizon's performance in those areas. *Id.* ¶ 24.

No anti-backsliding plan can achieve its intended goal of deterring anticompetitive conduct unless, *inter alia,* it is based upon a robust set of measures covering "a comprehensive range of carrier-to-carrier performance." *New York 271 Order* ¶ 433. These

[65] Opinion and Order, Joint Petition of NEXTLINK, Pennsylvania, Inc. *et al.* for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc., Docket No. P-00991643 (Pa. Pub. Util. Comm'n re. Dec. 31, 1999) (December 31, 1999 Order), (Application, App. b, Tab R-8) at 64.

[66] *New York 271 Order* ¶ 187 (footnote omitted); In re Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, Order Adopting Consent Decree, File No. EB-00-IH-0085m FCC 00-92 (Order release March 9, 2000) ("The receipt of the billing completion notice signals that Bell Atlantic has successfully transferred the customer to the competing carrier, which can then begin billing the customer without fear of double billing") at 3.

conditions do not presently exist in Pennsylvania; and it is, therefore, premature to rely on the PaPAP as an enforcement mechanism at this time.

2. The Performance Measures In The PaPAP Are Otherwise Unreliable.

Not only does the PaPAP exclude metrics that are essential to competition in the local market, but the measures contained within the PaPAP cannot be relied upon to report actual performance. Although Verizon touts the sheer number of measurements included within the PaPAP,[67] the volume of measurements is meaningless if they do not accurately capture the performance they are intended to measure. In order to provide *meaningful* information on performance, measurements must be well-defined, implemented properly and should not be subject to unilateral manipulation by the BOC. Unfortunately, a number of the performance measures within the PaPAP are ill-defined or inherently deficient because they do not capture actual performance. Bloss/Nurse Decl. ¶¶ 20-23. Additionally, actual market experience has shown that Verizon has unilaterally redefined or simply ignored other performance standards and guidelines at its whim. Bloss/Nurse Decl. ¶ 28.

Thus, for example, under the Pa. C2C Guidelines, Verizon is required to capture all local service request confirmations ("LSRCs") when calculating OR-6-03, the measurement on LSRC accuracy. Bloss/Nurse Decl. ¶¶ 33-34. However, Verizon, in flagrant disregard of performance standards, has captured only *samples* of LSRCs when reporting its performance in this area. *Id.* There are numerous other examples where Verizon has redefined or implemented performance measures in ways that skew its actual performance. *Id.* ¶¶ 36-44. Verizon's unwillingness or inability to comply with prescribed metrics standards is not only inexcusable, but it also highlights the inherent unreliability of its performance results.

3. Verizon's Reliance On KPMG's Test Is Misplaced.

Wrapping itself in the data replication test and "Commercial Availability Review" conducted by KPMG, Verizon contends that those tests demonstrate that its "performance measurement process from start to finish" produces accurate and reliable performance data – data that necessarily serve as the basis for any remedies payments under the PaPAP. Guerard/Canny/DeVito Decl. ¶ 146. Verizon's claims cannot withstand analysis.

When KPMG conducted its data replication test, it neither verified Verizon's adherence to the definitions in the Pa. C2C Guidelines, nor scrutinized the actual processes that Verizon used to extract the data from its systems that served as the basis for KPMG's study. Bloss/Nurse Decl. ¶¶ 45-47. Notably, because KPMG relied upon the *same* data that Verizon used to calculate its performance results, any errors that Verizon made in extracting the data from its systems would have been replicated in KPMG's own test. *Id.*

Equally unfounded is Verizon's attempt to seek refuge in KPMG's "Commercial Availability Review." *See* Bloss/Nurse Decl. ¶¶ 49-53. Verizon's analysis ignores that, during that review, KPMG explicitly stated that it was beyond the scope of its engagement to perform a data integrity analysis to reconcile any discrepancies in performance results that were identified by the CLECs. *Id.* ¶¶ 50, 53. And, true to its word, KPMG never reconciled the discrepancies in performance results reported by the CLECs. *Id.* Thus, Verizon's reliance on the KPMG's tests as evidence of the accuracy and reliability of its performance data is misplaced.

[67] *See, e.g.*, Verizon Br. at 84.

4. Verizon's Performance Results Are Unverifiable.

Not only are Verizon's performance results unreliable, but the performance results underlying its remedies calculations are unverifiable. As noted above, Verizon has repeatedly deviated from established performance standards. To complicate matters further, Verizon has either shrouded in secrecy or provided insufficient information regarding its deviations from or changes to metrics procedures. Bloss/Nurse Decl. ¶¶ 57-71. Indeed, in its evaluation of Verizon's OSS, KPMG concluded that Verizon's implementation of metrics change control procedures was plagued with problems. *Id.* ¶ 64. Because Verizon has not properly implemented metrics change control procedures, it is impossible for CLECs to verify Verizon's performance results and ensure the accuracy of its remedies calculations. Bloss/Nurse Decl. ¶ 71.

Verizon attempts to gloss over these issues by stating that it has improved its performance by developing new internal procedures governing the metrics change control process in Pennsylvania. Guerard/Canny/DeVito Decl. ¶ 139. However, it matters little that Verizon has *developed* new procedures governing the metrics change control process if it fails to *implement* those procedures properly. And Verizon has offered no probative evidence that it is *presently* implementing and tracking changes to performance measures *properly*.

Plainly cognizant of these shortcomings, Verizon claims that: (1) it has implemented in New Jersey the same metrics change control procedures that it has adopted in Pennsylvania; and (2) KPMG has examined those procedures "under the auspices of the New Jersey Board of Public Utilities" and found "no issues" regarding Verizon's implementation of its enhanced metrics change control process. *Id.* ¶ 139. Critically, Verizon's assertion blithely ignores that KPMG found, in its ongoing test of Verizon's New Jersey OSS, that there are

serious deficiencies in Verizon's metrics change notification process, and that those deficiencies thwarted the CLECs' ability independently to monitor and validate the accuracy of Verizon's performance results. Bloss/Nurse Decl. ¶ 69. Verizon has yet to address KPMG's concerns.

B. The PaPAP Cannot Deter Anticompetitive Conduct.

Because Verizon's performance results establish the point of departure against which any backsliding will be assessed, the inherent deficiencies in Verizon's performance results necessarily doom the PaPAP's remedies system to failure. Even *assuming arguendo* that Verizon's performance results could somehow be viewed as comprehensive, reliable, and verifiable, the structural flaws in the PaPAP make it impossible for the Commission to rely on the remedies provided under that plan to assure that Verizon will improve its future performance and not "backslide" into further discrimination.

The principal purpose of a performance assurance plan is to provide sufficient incentives for a BOC to continue providing CLECs the nondiscriminatory support required by Section 251 after a Section 271 application is granted. In order to be effective, an anti-backsliding plan must have definite monetary consequences that will be sufficient to dissuade the BOC from exercising its natural incentives to leverage its monopoly power in the local market, together with its position as the primary supplier of wholesale inputs to CLECs, to impede competition in both the local and long distance markets. Moreover, any such plan must be firmly rooted in an established, comprehensive and fully verified performance measurement system. The PaPAP falls far short of meeting these baseline requirements.

The PaPAP is structured in two tiers. Under Tier I, if Verizon misses a performance standard for a measurement within a thirty day period, Verizon is required to make

a pro-rated refund to the affected CLEC of any "out-of-pocket expenses" incurred by the CLEC for services that it never received.[68] However, the purported remedies payments under Tier I are largely illusory. Bloss/Nurse Decl. ¶ 82.

Notably, Verizon is only required to make Tier I refund payments if (1) the CLEC received *no* service with respect to the measurement that was missed; *and* (2) the CLEC requests a pro-rated refund and "support[s] a claim of out of pocket expenses."[69] On its face, the latter requirement belies the notion that the Tier I remedy mechanism is somehow self-executing. Worse yet, the former requirement appears to be based upon an ill-founded assumption that, as long as a CLEC receives *any* service – no matter how abysmal its quality or timeliness – no payments are warranted.

Similarly, the structure of Tier II remedies in the PaPAP also suffers from fundamental infirmities that render it ineffective to deter anticompetitive conduct. Bloss/Nurse Decl. ¶ 72. Tier II provides that Verizon is only required to pay $3000 per "miss" if it misses the standard for a performance measure for two consecutive months, and $5000 if it misses the same measure for the same CLEC for three consecutive months. Although Verizon is required to pay $25,000 per miss if it misses the same measurement for the same carrier for four or more consecutive months, its ability to manipulate its performance makes it virtually certain that it will never (or hardly every) reach that level. Thus, the Tier II remedies payments are too small to deter Verizon from engaging in seriously discriminatory conduct; and, of course, Verizon suffers *no* financial penalties under Tier II for any performance failures occurring in the first month.

[68] December 31, 1999 Order at 159.

[69] Opinion and Order, Joint Petition of NEXTLINK Pennsylvania, Inc., et al., for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic- (continued)

Additionally, the methods that Verizon uses to calculate Tier II remedies, including aggregating data when it suits its purposes, further minimizes the risk of any financial exposure. *Id.* ¶¶ 83-86.

No performance enforcement plan will deter Verizon from engaging in anticompetitive conduct unless the magnitude of the financial consequences for discriminatory behavior is greater than the expected value of the gains that Verizon will enjoy through unlawful conduct. There is virtually no likelihood that the current PaPAP could have such an effect. Although Verizon claims that its annual remedies payments under Tier II of the PaPAP could exceed "the 39 percent of net revenues the Commission found sufficient in Massachusetts,"[70] Verizon's analysis is based upon a set of unrealistic and unsupportable assumptions. Bloss/Nurse Decl. ¶ 84. The reality is that the maximum financial exposure that Verizon faces under the PaPAP is between about 10 and 25 percent of its net return – an amount well below the maximum potential risk of liability that the Commission deemed sufficient in Massachusetts. *Id.* ¶ 85.

The PaPUC, fully cognizant of the PaPAP's limitations and shortcomings, recently announced that it will conduct an additional proceeding, and that it has established "'a rebuttable presumption that the features of the NY remedies plan should be made applicable and tailored to Pennsylvania.'" Verizon Br. at 87 n.93. By referencing this most recent announcement in its application and observing that "all parties now agree that the remaining

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Pennsylvania, Inc., Docket No. P-00991643 (Pa. Pub. Util. Comm'n rel. Sept. 1, 2000) ("September 1, 2000 Order") (Application, App. B, Tab R-11) at 68.

[70] Verizon Br. at 89.

New York measurements should be adopted or use in Pennsylvania as well,"[71] Verizon leaves the impression that it would willingly adopt any new remedies and properly implement any new measurements that may be imported from New York into the PaPAP. However, Verizon's conduct before the Pennsylvania PUC demonstrates that the Commission should not accept such implications uncritically.

Months after the PaPUC initiated proceedings to examine performance measures, standards and remedies that should be adopted, Verizon challenged the PaPUC's authority to implement *any* performance standards and remedies. Bloss/Nurse Decl. ¶ 10. Moreover, in its state court appeal seeking to overturn the PaPAP, Verizon specifically maintained that "absent [Verizon's] concurrence, the Commission lack[ed] the authority to adopt and implement performance measures, standards, and remedies." *December 31, 1999 Order* at 8. Not only was Verizon's position fundamentally flawed, but it was also inconsistent with its "concession that performance measures, standards, and appropriate, self-executing remedies are a necessary prerequisite to the Commission's review of [its then] anticipated Section 271 Application." *Id.* at 12. In fact, it was only after the PaPUC expressly conditioned its approval of Verizon's Section 271 application, *inter alia,* on the withdrawal of its state court appeal that Verizon grudgingly withdrew its state court appeal – and then it did so *without prejudice.* Thus, Verizon remains free to challenge at *any* time the PaPUC's authority to impose *any remedies* for its performance failures. Bloss/Nurse Decl, ¶¶ 91-92. It must also be emphasized that Verizon has adamantly *opposed* the adoption of the New York PAP in Pennsylvania.[72] Given this remarkable set of circumstances, Verizon cannot seriously contend that it is currently subject to an enforcement

[71] Verizon Br. at 85.

[72] *See, e.g.,* Verizon Prehearing Memorandum at 2.

plan with "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[73]

Equally unfounded is any suggestion that Verizon will unflinchingly embrace or properly implement any measures that may be incorporated into the Pa. C2C Guidelines in the future. Verizon's repeated refusals and outright failures to comply with PaPUC's orders and performance standards in the past clearly warrant substantial skepticism from this Commission.

For example, in clear defiance of the *December 31, 1999 Order* directing it to file a "compliance report" setting forth all of the performance standards established by the Pennsylvania PUC, Verizon filed a document that was littered with unilateral and unauthorized changes to prescribed metrics standards. Bloss/Nurse Decl. ¶ 8. Similarly, Verizon flouted the same *December 31, 1999 Order* direction to report on all performance measures commencing in April 2000. In fact, Verizon provided no results at all for scores of metrics for months and simply advised the CLECs that the omitted metrics were either "under development" or "under review." Bloss/Nurse Decl. ¶ 29. And, even after Verizon presumably "developed" or completed its so-called "review" of the metrics in question, it neither restated its prior performance results to include the data that it had unilaterally omitted in the first instance, nor agreed to make any retroactive payments for any performance failures covered by the omitted metrics. *Id.* ¶ 30.

Against this backdrop, Verizon should not be permitted to rely on any *future* changes to performance measures or *future* refinements to the system of PaPUC remedies as evidence of its *present* compliance with its Section 271 obligations. Past experience on these

[73] *New York 271 Order* ¶ 433.

very issues has taught that there is no reason to believe that Verizon will willingly adopt or properly implement any such changes for Pennsylvania. And, in all events, this Commission has repeatedly held that "promises of future compliance" are entitled to no evidentiary weight.[74]

The deficiencies in the comprehensiveness, reliability, and verifiability of Verizon's performance measurements, as well as the defects in the remedial structure of the PaPAP, must be corrected now, before Verizon receives interLATA authorization under Section 271. The standards that this Commission has uniformly established for Section 271 compliance require no less; and those standards are too vital to protect nascent local competition to warrant compromise now.

V. VERIZON'S APPLICATION IS NOT IN THE PUBLIC INTEREST.

There is a final, independent reason why the Commission should deny Verizon's application. Even if the Commission could rationally find that Verizon had fully implemented its obligations under the competitive checklist, including its duty to set cost-based rates within the range that a reasonable application of TELRIC would produce or to provide nondiscriminatory access to resold DSL and to its operations support systems, the record here precludes any finding that granting Verizon's application is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The reason is straightforward. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully open to competition. The first step is to assess the actual state of local competition. Here, the record shows that residential

[74] *New York 271 Order* ¶ 39. *See also Ameritech Michigan 271 Order* ¶ 55; *BellSouth South Carolina 271 Order* ¶ (continued)

competition is minimal. The second step thus requires a determination whether the lack of competition is attributable to the BOC's misconduct and/or persisting barriers to entry, or instead reflects neutral business considerations uniquely within the control of new entrants (such as a regional business plan that does not include entry into a particular state for business reasons apart from whether the market is open to competition). *Michigan 271 Order* ¶¶ 385-391.

This analysis of whether local markets in fact are open not only is mandated by the terms of the Act and the Commission's prior orders, but is eminently practical and provides reasonable certainty to all parties as to the relevant factors likely to determine the outcome of the public interest inquiry. Because the relevant factors here demonstrate that the local residential markets in Pennsylvania remain closed to competitors, approval of this application is not in the public interest.

A. InterLATA Authorization Is Not In The Public Interest Unless The BOC's Local Markets Are Irreversibly Open To Competition.

As a threshold matter, Verizon "disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public-interest inquiry." Verizon Br. at 74 n.73. The Commission has previously considered and flatly rejected the argument once again advanced by Verizon:

> We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace government regulation of telecommunications markets with the discipline of the market.

38.

> In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including the BOCs, to provide access to their networks in a manner that allows new entrants to enter local telecommunications markets through a variety of methods. In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.

Michigan 271 Order ¶ 386. *See also Massachusetts 271 Order* ¶ 233 ("we may review the local and long distance markets to ensure that these are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application").

Accordingly, the key question to be resolved in the public interest inquiry is whether the BOC's local markets truly "are open to competition" from new entrants. *See, e.g., Kansas/Oklahoma 271 Order* ¶ 267. To be sure, the competitive checklist sets forth the minimum criteria that make it possible for local markets to be open to competition. But meeting the checklist requirements alone is not sufficient to demonstrate that local markets are open. Rather, Section 271(d)(3) requires an additional and independent finding that entry is in the public interest. *E.g., Michigan 271 Order* ¶ 389. The public interest test reflects Congress's realization that, at least in some states, mere satisfaction of the checklist would not be sufficient to allow local competition to develop, and that if the BOCs in those states nevertheless received long distance authority they would leverage their local monopoly into the long distance market – precisely the harm that the ban on interLATA service in Section 271(a) is designed to prevent.

The legislative history of Section 271 confirms that Congress intended the public interest determination to reflect an analysis of the actual competitive effects of granting the

application. In describing the statutory role of DOJ, the Conference Report made clear that the Department could make its analysis under any competitive standard it chose, including Section VIII(c) of the MFJ as well as statutory antitrust standards. S. Conf. Rep. No. 104-230, at 149 (1996). *See Michigan 271 Order* ¶ 383 (exploring relevance of DOJ Evaluation to considerations of public interest). Thus, as the Commission has previously stated, Section 271 "embodies a congressional determination that . . . local telecommunications markets must *first* be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market." *Michigan 271 Order* ¶ 388 (emphasis added).

Thus, to determine whether the BOC's local telecommunications markets are in fact open to competition, the Commission first reviews the extent to which new entrants "are actually offering" local service to both business and residential customers through each of the three means offered by the Act. *Michigan 271 Order* ¶ 392. Second, where local competition is not securely established, the Commission determines whether this reflects the continuing presence of entry barriers and BOC misconduct, or is attributable instead solely to the business decisions of potential new entrants.

B. Verizon Maintains Monopoly Power Over Residential Service.

In its *Michigan 271 Order*, the Commission recognized both that the "Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale," (*id.* ¶ 96), and that Congress "sought to ensure that all procompetitive entry strategies are available." *Id.* ¶ 387. The Commission concluded that "[o]ur public interest analysis of a section 271 application, consequently, *must* include an assessment of whether all procompetitive entry strategies are

available to new entrants." *Id.* (emphasis added). The Commission then explained that "the most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof) in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)." *Id.* at ¶ 391 (emphasis added). In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act. *See, e.g., New York 271 Order* ¶¶ 13-14; *Texas 271 Order* ¶¶ 5-6.

Here, Verizon's own data confirm that competitors have not yet been able significantly and irreversibly to enter the local residential market. In particular, those data show that Verizon maintains a virtual monopoly over residential service in its Pennsylvania service territories. Using the E911 data presented by Verizon witness William E. Taylor, Tables 1 and 2 show the amount of CLEC competition in Pennsylvania. The data in Table 2 shows that there is insignificant competition for residential service – just over 2% of the residential lines in Verizon's Pennsylvania service territory are served by facilities-based and just over 4% of such lines are served by UNE-based competitors.[75]

[75] These percentages undoubtedly *overstate* the percentage of CLEC penetration in Verizon's Pennsylvania service territory. Although Verizon repeatedly trumpets the number of access lines served by CLECs in Pennsylvania as of *April 2001*, Verizon fails to provide any data concerning the number of access lines served by *Verizon* in Pennsylvania. In preparing Tables 1 and 2, we have relied on Commission data reflecting Verizon access line service volumes as of *December 1999*. Those numbers would clearly be far higher as of April 2001 and the resulting CLEC penetration shares would be lower.